

COMMONWEALTH OF MASSACHUSETTS

ESSEX COUNTY

SUPREME JUDICIAL COURT
NO.

APPEALS COURT
NO. 2017-P-0095

COMMONWEALTH

V.

JONATHAN PICKERING

JONATHAN PICKERING'S APPLICATION FOR
DIRECT APPELLATE REVIEW

Now comes Jonathan Pickering, pursuant to Mass. R.
A. P. 11, and requests that he be granted direct
appellate review of the order revoking his probation on
indictment ESCR2014-683 in Essex County Superior Court.

The grounds for this application are stated in the
accompanying memorandum.

Respectfully submitted,

Jonathan Pickering

By his attorney,

/s/ Emily A. Cardy

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COMMONWEALTH OF MASSACHUSETTS

ESSEX COUNTY

NO. 2017-P-0095

COMMONWEALTH

V.

JONATHAN PICKERING

MEMORANDUM IN SUPPORT OF JONATHAN PICKERING'S
APPLICATION FOR DIRECT APPELLATE REVIEW

STATEMENT OF PRIOR PROCEEDINGS

Jonathan Pickering appeals from the revocation of his probation on complaint ESCR2014-683 in Essex County Superior Court (R.A. 9-10).^{1/}

On November 18, 2014, Pickering pleaded guilty to two counts of open and gross lewdness, G.L. c.272, §16 (R.A. 6). On one count, he was sentenced to two years in the house of correction with thirty days to serve and the balance suspended for five years (R.A. 6). On the other count, he was sentenced to five years of probation on and after (R.A. 6).

On September 25, 2015, Pickering was notified in writing that he had allegedly violated his probation (R.A. 31). As the reason for the violation, the notice

¹The record appendix will be cited as (R.A. _). The transcripts will be cited by volume and page as (Tr. _/_).

cited "contact with a child under the age of 16" via Craigslist, on or about July 31, 2015 (R.A. 31).

A hearing on the probation violation took place before the Honorable Timothy Feeley on April 11 and 25, 2016 (R.A. 9-10). On April 11, the Commonwealth moved to amend the complaint to a violation for "attempted enticement of a child under the age of sixteen," which violated the condition of probation that Pickering "obey all local, state, and federal laws" (Tr. 1/6-10, 14).^{2/} Judge Feeley allowed the Commonwealth's amendment of the surrender notice, amending it to allege new criminal activity in violation of G.L. 265, §26C(b) (Tr. 1/16-17; 2/3-4, 65).

After a two-day evidentiary hearing, Judge Feeley found Pickering in violation of his probation (R.A. 9-10). Judge Feeley revoked Pickering's probation and sentenced him to two years in the house of correction (R.A. 9-10).

Pickering filed a timely notice of appeal on April 27, 2016 (R.A. 36). This case was entered in the Appeals Court on January 26, 2017, and the defendant's brief was filed on February 28, 2017.

²Pickering was never separately charged with the newly alleged offense.

STATEMENT OF FACTS RELEVANT TO THE
APPLICATION FOR DIRECT APPELLATE REVIEW

Jonathan Pickering's probation was revoked for attempting to entice a child under the age of sixteen during an email exchange (Tr. 2/65-66). It was uncontested, however, that a real child never existed (Tr. 1/10-13, 15; 2/46, 61). The "child" was actually a member of Pickering's sex offender therapy group, who was covertly attempting to verify statements Pickering made during group therapy (Tr. 1/61; 2/27-28).

The only issue at Pickering's probation revocation hearing was whether he knew during the email exchange that he was not communicating with a child, but with an adult who he knew shared similar sexual proclivities (Tr. 1/15, 68-69; 2/59). His defense was that because he knew the person with whom he exchanged emails was an adult, he did not have the requisite intent to entice a child (Tr. 1/15-17; 2/59, 62, 70).

The Set-Up

For about six months, Scott Deschenes and Jonathan Pickering participated in the same court-mandated sex offender therapy group (Tr. 1/44, 67). The men did not have a social relationship outside of group therapy (Tr. 1/44-45, 61-62), but they were "close" "as far as therapy goes" (Tr. 2/25).

Deschenes was required to attend sex offender therapy because he was on probation for indecent assault and battery on a child under fourteen and enticement of a child (Tr. 1/43-44).^{3/} During the course of the therapy sessions, Deschenes began questioning Pickering's forthrightness with the group (Tr. 1/44-46, 60). According to Deschenes, Pickering told the group that he had a relationship with a person in another country to whom he regularly sent money (Tr. 1/44), but group members "believed it was a scam" (Tr. 1/46). Additionally, "[w]hen asked personal questions, [Pickering] would try and deflect and change the subject. And it led [Deschenes] to believe that [Pickering] was doing something that he wouldn't want the group to find out" (Tr. 1/46). Deschenes set out to investigate if Pickering was hiding anything and to "see if he was actually interested in younger - younger people and see if [Deschenes's] thoughts were right" (Tr. 1/46, 74).

Deschenes responded to an advertisement that Pickering posted on Craigslist seeking consensual,

³Deschenes was originally charged with rape of a child (Tr. 1/68).

adult sexual encounters (Tr. 1/46-47; R.A. 33-35).^{4/} Using the email address Beachdude02031991@gmail.com (Tr. 1/49; R.A. 34), Deschenes "posed as a 13 year-old boy" who was interested in a sexual meet-up with Pickering (Tr. 1/20; R.A. 16, 34). Specifically, Deschenes asked "how young was acceptable for him" (Tr. 1/47; R.A. 16).

Over the course of four days, Pickering and Deschenes (posing as the boy) exchanged a series of twenty-four emails about the possibility of a sexual meet-up (Tr. 1/47-49, 52-59; R.A. 16-24). The emails, which were often sexually explicit, included discussion about "the boy's" age, sexual acts of interest, and options for meeting in person (Tr. 1/47-49, 52-59; R.A. 16-24).^{5/} Pickering also asked for a picture, and Deschenes emailed him a clothed photo of a boy that he found via Google (Tr. 1/58; R.A. 25).

On August 20, 2015, Deschenes copied and pasted the emails between him and Pickering into a new email to Robert Nazzaro, the leader of their court mandated

⁴Deschenes knew it was Pickering's advertisement because it included clothed and nude pictures of Pickering (Tr. 1/47; R.A. 26-28).

⁵Deschenes did not know whether Pickering thought that he was emailing with a real 13 year-old boy (Tr. 2/28-29).

sex offender therapy group (Tr. 1/61, 74-75; R.A. 15-16). He sent the email anonymously, posing as a "concerned friend" of Pickering's (Tr. 1/60-61, 74; R.A. 15-16). He sent the emails to Nazzaro because he wanted him to be "aware that there was more going on in Mr. Pickering's life than he was leading on to in [their] therapy group, and [he] wanted it to be brought forward and brought to light in front of [the] other participants in the therapy group" (Tr. 1/60).

Days after Deschenes emailed Nazzaro, Pickering was arrested (R.A. 7). It was not until March 25, 2016, when a forensic expert examined the unallocated data from Pickering's cell phone and provided his report to the police, that the police confirmed that Deschenes sent the emails, and that the purported thirteen-year-old boy did not exist (Tr. 1/10-13; 2/12-13, 46). The police then interviewed Deschenes, who confirmed that it was he who had emailed with Pickering (Tr. 2/27-28).

The Emails and Deschenes's Attempts to Conceal His Identity

While emailing with Pickering, Deschenes attempted to conceal his identity because Pickering knew some identifying information about him (Tr. 1/46, 49, 51, 56, 60). Pickering knew that Deschenes lived in Salem

(Tr. 1/56), there was no other person named "Scott" in their therapy group (Tr. 1/67), and while their therapy group only used first names (Tr. 1/45, 62), they signed in to each session using their first and last names (Tr. 1/67). Deschenes feared that he went "to group with [Pickering], so if he thinks that someone named Scott is emailing him from Salem, he might think that it's a setup" (Tr. 1/56). Deschenes, therefore, used a Craigslist privacy setting to email Pickering (Tr. 1/31). With that setting, Craigslist replaced Deschenes's personal email address with an anonymous email address, which "looks like a random number" (Tr. 1/31-32).

Deschenes also attempted to conceal his identity from Nazzaro (Tr. 1/60-61). When Deschenes emailed Nazzaro his cut-and-pasted exchange with Pickering, he redacted his "Craigslist relay e-mail address from all of the correspondence and replaced [it] with [']withheld[']" (Tr. 1/24-25, 60). A copy of his email to Nazzaro, with his cut-and-pasted exchange with Pickering, was admitted in evidence at the violation hearing (Tr. 1/20; R.A. 15-30).

In addition to the copies of the emails that Deschenes sent to Nazzaro, the evidence included the

emails taken from Pickering's cell phone's "unallocated space" (Tr. 1/25).^{6/} As explained below, the evidence showed that Pickering actually may have been able to see that Deschenes was the person sending the emails.

The unallocated space is the part of the memory that keeps deleted data but does so without indexing it to a specific location on the phone (Tr. 1/25-26, 33). Data can "end up" in the unallocated space because a user deletes it or if it was originally viewed through a web browser and the browser deletes it to work with more current data (Tr. 1/39). All but four of the emails between Deschenes and Pickering were in Pickering's phone's unallocated space (Tr. 1/26, 35-36). The content of the emails in the unallocated space was identical to those Deschenes sent Nazarro except for one significant difference: the emails taken from the cell phone showed "Scott Deschenes" as a sender and a recipient, instead of "name withheld," as

⁶Joseph Nichols, a computer forensic expert, testified at the hearing about how, from the data he received from the State Police, he extracted the emails from the cell phone's unallocated space (Tr. 1/23-24). Officers had previously examined the contents of the phone (Tr. 2/49), but they did not have the technology to pull the data out of the cell phone's unallocated memory (Tr. 2/51-52).

was on the emails sent to Nazzaro (Tr. 1/26, 37).^{7/}

Thus "as the cell phone user would have been receiving these emails" "it would have said Scott Deschenes" (Tr. 1/26) - after the "to" and "from" labels, the emails "said Scott Deschenes and then had a Gmail or some type of e-mail address after it" (Tr. 1/37).

More specifically, even if a Craigslist privacy setting is used, what the viewer saw depended on how he viewed the emails: if the receiver "looked at it through a regular browser, looked at that e-mail, then yes [Scott Deschenes] would show up" (Tr. 1/37-38).^{8/}

If the receiver looked at the email through "an app specific for this, such as a Craigslist app or something like that, then the application on the phone could see the privacy setting and script [the name]

⁷There was one other difference. In one email Deschenes forwarded to Nazzaro, the suggested meet-up location was Swampscott (Tr. 1/27, 56). The very same email in the unallocated space suggested Salem as the meet-up location (Tr. 1/27). Deschenes testified that he changed the town name to conceal his identity because he "wanted to minimize the chance of [Pickering] being able to correlate anything between me and Salem" (Tr. 1/56). He feared that if Pickering knew a Scott from Salem was emailing him "he might think it's a setup" (Tr. 1/56).

⁸Deschenes testified similarly, explaining that "sometimes when you send an e-mail on - on a personal ad, instead of the Craigslist5144 [address] ... popping up as the name, sometimes it will show the name that's registered to the actual email address" (Tr. 1/56).

off" (Tr. 1/38).^{9/} Consistent with the forensic expert's testimony, Deschenes did not discount the possibility that Pickering might have seen his last name on his emails, but believed that his identity was concealed nonetheless (Tr. 1/56, 62).

Pickering's Defense

The only contested issue at the hearing was Pickering's intent during the email exchange; his intent was "what this is all about" (Tr. 1/68-69). The question was whether Pickering intended to entice a thirteen-year-old child or to communicate with an adult from his sex offender therapy group (Tr. 1/15; 2/59). His intended defense was that he knew the person with whom he communicated via Craigslist was actually an adult from his sex offender treatment group who shared similar sexual interests (Tr. 1/15-16; 2/12-13). The emails were thus sexual role play, not enticement of a child (Tr. 1/15-16; 2/12-13). His argument was that it was "[a]pparent as he was receiving these emails that they were from Scott Deschenes ... who he knows has also proclivities, interest in communicating sexually

⁹The expert testified that there was no way to tell from the emails in the unallocated space how Pickering viewed the emails - through a browser or through a special application (Tr. 1/38).

with children under the age of 16" (Tr. 1/16).

Essential to this defense was evidence about Deschenes's sexual interests and his convictions because Pickering's "state of mind is informed by what he knows about Mr. Deschenes" (Tr. 1/70). Thus Pickering sought to present evidence that he knew about Deschenes's prior conviction (Tr. 1/69-70), and his "proclivities, preferences, [and] the age of the victim in [Deschenes's] case" (Tr. 2/7). That evidence would go "directly to the reasonableness of Mr. Pickering's assumption that he was talking to this other adult individual in the group who it would have been very logical for Mr. Pickering to think was interested in ... an e-mail roleplaying communication" (Tr. 2/7-8).

Over objection (Tr. 1/71; 2/16-17) and citing no authority, the judge excluded all evidence of what Deschenes shared during group therapy, ultimately ruling that it was protected by the psychotherapist privilege (Tr. 1/68, 71-72; 2/13, 15, 16, 18, 21-22). The judge excluded evidence to be offered through cross-examination of Deschenes and through Pickering's own testimony about what Deschenes said (Tr. 2/16,

22).^{10/} The judge excluded Deschenes's statements even though Deschenes had already testified about Pickering's statements during group therapy that lead Deschenes to pose as the boy (Tr. 1/46, 60).

In excluding Pickering's evidence, the judge assumed that the psychotherapist privilege applied while expressing uncertainty about the state of the law regarding the privilege and group therapy (Tr. 1/72, 76, 78; 2/13, 18, 22).

Pickering conceded that the group therapy sessions were confidential (Tr. 2/5; 62), but consistently argued that Deschenes had waived his confidentiality (Tr. 1/78; 2/6) and that because of the judge's ruling, he was "completely defenseless" (Tr. 2/16). After the ruling, Pickering "ha[d] no way to defend himself against these allegations" (Tr. 2/17).

ISSUE PRESENTED

Does the psychotherapist privilege apply in group therapy, and if it does, when a group member violates

¹⁰The judge initially ruled that Pickering could testify about what he knew of Deschenes's convictions and proclivities (Tr. 1/69, 71), but later reversed himself, ruling that Pickering could neither elicit the testimony from Deschenes nor testify about it himself (Tr. 2/22).

the privilege by testifying about another member's confidential statements, as he did here, does he waive his own privilege?

STATEMENT AS TO PRESERVATION

Both before the hearing began and during the hearing, Pickering repeatedly objected to the exclusion of relevant statements Deschenes made during group therapy about his own sexual proclivities (Tr. 1/71; 2/16-17). The exclusion of this evidence was Pickering's focus because this evidence was essential for him to present his defense that he did not *intend* to entice a child, and instead meant the email exchange as sexual fantasy with someone he knew to share his sexual proclivities (Tr. 1/15-16; 2/12-13, 59, 68-69). When the judge excluded Pickering's evidence, Pickering objected on the basis that it deprived him of his constitutional right to present a defense (Tr. 1/71; 2/16-17).

The judge and both parties discussed the problem of privilege and confidentiality at length throughout the proceeding (Tr. 1/63-65, 68-73, 75-78; 2/5-7, 12-21). During these discussions, the judge and both parties assumed that the psychotherapist privilege

applied to group therapy (Tr. 2/5, 13, 15, 16, 18, 62).

The next question was whether Pickering could present his evidence - either by his own testimony or during cross examination of Deschenes - despite the privilege. As to the question of waiver, Pickering argued that Deschenes had waived his privilege, albeit on different grounds than those argued on appeal.^{11/} But Pickering did object to the prosecutor pressing Deschenes for greater detail about statements that Pickering made in group therapy (Tr. 1/63). Because of Pickering's objection, the judge recognized that confidentiality and privilege might be at issue. (Tr. 1/63). He ended the prosecutor's questioning, though not before some of Pickering's statements from group therapy came in evidence (Tr. 1/63-66).

In discussing whether to admit statements that Deschenes made during group therapy and how the privilege might operate in the context of group therapy, the judge contemplated that it could be possible to waive a group therapy privilege. He opined that "if [Deschenes] waives [the privilege], he can't

¹¹Pickering argued that Deschenes waived his psychotherapist privilege by previously telling the officers investigating this case about what he said about himself in group therapy (Tr. 1/78; 2/6).

testify as to what Mr. Pickering said in the group... or anyone else said in the group... All he can say is [']I said this in group['], if he waives the psychotherapist privilege" (Tr. 2/22). Ultimately, the judge excluded all of the evidence over objection (Tr. 1/68, 71-72; 2/13, 15, 16, 18, 21-22).

In sum, the issue of whether the evidence Pickering sought to present was admissible was fully preserved. Also fully preserved was the argument that the exclusion of the evidence violated Pickering's constitutional right to present a defense (Tr. 2/16-17). The portion of the argument on appeal that is new is the specific proposal as to how waiver would operate in the context of a psychotherapist privilege that applied to group therapy.

ARGUMENT

IF THE PSYCHOTHERAPIST PRIVILEGE APPLIES TO GROUP THERAPY, DESCHENES'S VIOLATION OF THE PRIVILEGE BY TESTIFYING ABOUT STATEMENTS THAT THE PROBATIONER MADE IN GROUP THERAPY ACTED AS A WAIVER OF HIS OWN GROUP THERAPY PRIVILEGE.

This Court has never considered whether the psychotherapist privilege provided by G.L. c. 233, §20B applies in group therapy, and if it does apply, who may waive the privilege and how. This case presents both

of these issues of first impression.

Though not previously recognized in Massachusetts, the psychotherapist privilege provided by G.L. c.233, §20B likely applies to group therapy. And if the privilege applies, any waiver of it must operate to provide assurances of confidentiality to all group members and dissuade its violation.

This case illustrates the importance of answering these novel questions, and doing so in a way that protects the rights of all group therapy members. Here, Deschenes and Pickering participated in the same group sex offender therapy. Deschenes violated the therapy group's privilege when he testified about what Pickering told the group about his relationships and sexual interests. When Pickering sought to ask Deschenes about relevant confidential statements that Deschenes made during group therapy, the judge ruled that the information was privileged. The judge thus precluded both Pickering's inquiries of Deschenes and Pickering's own potential testimony about Deschenes's statements.

The problem here was that Deschenes was permitted to hide behind the very privilege that he breached - he used the privilege as a sword and a shield. Instead,

to better protect the privilege, if it applied, once Deschenes pierced the privilege by revealing Pickering's group therapy statements, he should not have been allowed to use the privilege to shelter his own statements from exposure by Pickering. Deschenes's own testimony opened the door to Pickering's inquiries.

A. Massachusetts's psychotherapist privilege should apply in group therapy.

Communications between patient and psychotherapist are privileged to protect the integrity of psychotherapy, which "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." Jaffee v. Redmond, 518 U.S. 1, 10 (1996). As such, "the most effective assistance of a therapist ... can be achieved only through open communication, which is likely not to occur absent a guarantee that what the patient, or client, says will not be disclosed to others without her consent." District Attorney for Norfolk Dist. v. Magraw, 417 Mass. 169, 173 (1994).

Assurances of confidentiality are no less essential in a group setting, as the few courts that have addressed the question of the psychotherapist privilege and group therapy have noted. See State v.

Andring, 342 N.W.2d 128, 134 (Minn. 1984) ("the confidentiality of communications made during group therapy is essential in maintaining the effectiveness as a therapeutic tool"). Farrell L. v. Superior Court, 203 Cal. App. 3d 521, 527 (1988) ("the communication with other participants in group therapy is reasonably necessary for the accomplishment of the [therapy's] purpose"). Because effective group therapy depends upon confidentiality, excluding "group therapy from the scope of the psychotherapist-patient privilege would seriously limit the effectiveness of group psychotherapy as a therapeutic device." State v. Andring, 342 N.W.2d at 134.

As the judge here recognized,^{12/} the application of the privilege to groups is consistent with existing Massachusetts law, which is grounded in protecting "the justifiable expectations of confidentiality that most individuals seeking psychotherapeutic treatment harbor." Usen v. Usen, 359 Mass. 453, 457 (1971). And §20B already envisions situations where the privilege applies to multi-party conversations. It expressly applies to "family therapy" and "marital therapy," G.L.

¹²Here, the judge and Pickering agreed that the privilege applied (Tr. 2/13, 15, 16, 18).

c.233, §20B, which necessarily include the participation of multiple parties who are integral to the therapy.

Massachusetts also recognizes the "common interest doctrine" -- applicable in the context of attorney-client privilege -- which is instructive here. "[T]he common interest doctrine 'extends the attorney-client privilege to any privileged communications shared with another represented party's counsel in a confidential manner for the purpose of furthering a common legal interest.'" Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc., 449 Mass. 609, 612 (2007) (internal citations omitted). Similarly, in group therapy, the psychotherapist and the group members share the common interest of giving and receiving effective psychological treatment. Each individual's treatment is bound up with the other members' treatment; "every participant actually becomes part of the diagnostic and therapeutic process for co-participants." State v. Andring, 342 N.W.2d at 133. See Farrell v. Superior Court, 203 Ca. App. 3d at 527 ("The presence of each person is for the benefit of the others, including the witness/patient, and is designed to facilitate the patient's treatment"). Because group members are

linked by both giving and receiving the benefit of each other's participation, the psychotherapist privilege must apply to all group members.

The record here shows that the court-mandated sex offender group therapy sessions in which Pickering and Deschenes participated were occasions when they shared highly personal and even taboo information about thier sexual proclivities (Tr. 1/46, 74). This is precisely the kind of information that the psychotherapist privilege seeks to protect to encourage it being shared in the service of treatment. Sharing the information in a group should not alter the protection afforded to it.

- B. If the psychotherapist privilege does not apply to group therapy, the judge's exclusion of the evidence here was error.

If, however, this Court decides that Massachusetts law does not support the application of the psychotherapist privilege to group therapy, Pickering must prevail. If the psychotherapist privilege does not apply to groups then the judge here erred in excluding the evidence of what Deschenes told the group about his convictions and sexual proclivities. But for the privilege, the evidence was admissible.

It was uncontested at the hearing that the

evidence was relevant because it bore on Pickering's state of mind, which was the only contested issue at the hearing (Tr. 1/15-17). And no other rule of evidence would have barred its admission. If the evidence that Pickering sought to offer was not privileged, the judge's exclusion of it was error that deprived Pickering of his right to present a defense.

- C. If the psychotherapist privilege applies to group therapy and a group member violates the privilege, that violation should act as a waiver of his own group therapy privilege.

If, though, this Court holds that the psychotherapist privilege applies to groups, here, it was not a bar to the admission of Pickering's evidence. As a qualified privilege, the psychotherapist privilege can be waived. Commonwealth v. Clancy, 402 Mass. 664, 668-669 (1988). In its conventional application, the privilege may only be waived by the privilege holder, the patient. Waiver in the context of the group must operate similarly to assure confidentiality for all group members.

In group therapy, the rule must be that a group member may waive his own privilege as to statements he made himself during group therapy, but he cannot waive

the privilege for any other group member.^{13/} Cf. ZVI Const. Co. v. Levy, 90 Mass. App. Ct. 412, 424-426 (2016) (exploring waiver in the context of the attorney-client privilege "common interest doctrine"). This would mean that a person could choose to protect or disclose his own statements, but never to disclose the statements of others. Allowing one group member to waive the privilege for all, or even another, by disclosing their confidential statements would vitiate the privilege - "the concept of confidentiality would be undermined if such unilateral acts were condoned." Id. at 425. A privilege that does not protect against the exposure of one person's group therapy statements by another person would be no privilege at all.

In the event that a group member violates the privilege, then, that violation should act as a waiver of his own privilege. If, as Deschenes did here, a group member prematurely discloses confidential statements made by another member, that inadmissible testimony would, in effect, open the door to offer relevant statements that the violator made during group

¹³Accord 25 Kenneth W. Graham, Federal Practice and Procedure § 5531 n.95 (1st ed. 1989) ("whether one patient can assert the privilege when another wants to disclose something that was said in therapy to prove his case in court could presumably be handled by analogy to joint clients").

therapy. In this way, the waiver doctrine would act akin to the curative admissibility doctrine, which is applicable when the 'original evidence ... was improperly admitted." Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 17 (1998). In those circumstances, "a party has a right to rebut inadmissible evidence that is material, relevant, and prejudicial by introducing evidence to contradict it, even though the evidence would otherwise be inadmissible." Burk v. Memorial Hosp., 29 Mass. App. Ct. 948, 950 (1990).

Similar principles apply in the context of waiving the group privilege. Certainly Deschenes's testimony that opened the door was inadmissible, material, relevant, and prejudicial. It was inadmissible because he testified about Pickering's relationships and sexual interest in "young boys," of which he only could have learned through the privileged group therapy sessions. It was material, relevant, and prejudicial because, in testifying about why he set up his covert investigation, Deschenes revealed unsavory details about Pickering that tarnished his character and conveyed that he might be interested in enticing a child. And the evidence to which Deschenes opened the door - his own group therapy statements - would have been otherwise inadmissible. While the evidence about Deschenes would not have been offered as substantive

rebuttal to Deschenes testimony, it would have answered Deschenes's violation of the men's shared privilege.

Treating the violation of the group therapy psychotherapist privilege as a waiver supports the aim of the privilege. As described in the out-of-state cases noted earlier, effective group therapy depends on the promise of confidentiality to encourage frank discussions and the ready disclosure of individuals' thoughts and emotions. Members of the group must be assured that their statements will be kept confidential by all, therapist and group members alike. Because group therapy necessarily requires more than two people, the stakes for protecting against disclosure are even higher than they are for one-on-one therapy. A waiver doctrine that incentivizes confidentiality is valuable and appropriate.

The waiver doctrine as discussed allows a person to disclose his own group therapy statements without consequence. But if he substitutes his judgment for his fellow group member's judgment and makes the "highly individualized" decision about "what is personal, private, or embarrassing," Commonwealth v. Oliveira, 438 Mass. 325, 334 (2002), he ruptures the confidentiality bubble that makes group therapy effective. It is fitting, then, that he should no longer enjoy the protections of the same privilege

bubble that he burst.

The judge's exclusion of Pickering's evidence of Deschenes's statements about his convictions and sexual interests -- after Deschenes had already testified freely about Pickering's confidential group therapy statements -- was error that failed to protect the goals of the psychotherapist privilege.^{14/} The exclusion deprived Pickering of his defense and violated his constitutional right to due process.

STATEMENT OF REASONS WHY
DIRECT APPELLATE REVIEW IS APPROPRIATE

This case presents two questions of first impression: 1) does the psychotherapist privilege apply to group therapy, and 2) if the psychotherapist privilege applies and a group member violates it, does the privilege continue to protect his own statements to the group or does his breach act as a waiver?

Neither this Court nor the Appeals Court has ever decided whether the psychotherapist privilege provided by G.L. c. 233, §20B applies in group therapy, and if so, how. Equally surprisingly, there are few cases in any court that address this question either. Supra at

¹⁴Pickering argued that Deschenes waived his privilege, but on different grounds (Tr. 1/78; 2/6-7, 11-16).

18-19. And the defendant can find no published case in any jurisdiction that addresses when the psychotherapist privilege as to group therapy is waived and who can waive it for whom. The only source that the defendant can find even touching on the subject of waiver as applied to the privilege and group therapy is a 1989 secondary source discussing a rejected rule of Federal procedure. See supra at 23 n.13.

The questions presented here are, indeed, novel and they are also of significant public importance. Of course, the degree of confidentiality that individuals can expect in group therapy is a question applicable in various legal contexts. But this case illustrates the question's particular importance to criminal law, where individuals can be ordered to participate in sex offender group therapy. The courts and society at large certainly have an interest in ensuring that the therapy they mandate is effective treatment. And the individuals participating also have an interest in understanding the stakes of their participation.

The two questions of first impressions that affect such issues of public importance presented here are best left to this Court's judgment. Mass. R. A. P. 11.

CONCLUSION

For the foregoing reasons, Pickering asks that this Court grant him direct appellate review.

If direct review is granted, Pickering also requests that this Court review the additional issues that he raises on appeal:

1. Whether the psychotherapist privilege applied here where the holder of the privilege never asserted it, and where there was no evidence that the leader of the therapy sessions was a "psychotherapist" pursuant to the statute?

2. Whether, if the psychotherapist privilege applied here, the probationer should have been allowed to offer evidence of the witness's statements in group therapy because the probationer's constitutional right to present a defense trumped the witness's qualified statutory privilege?

Respectfully submitted,

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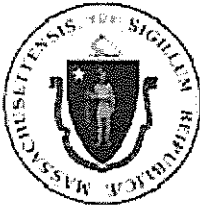
Dated: March 17, 2017.

CERTIFICATE OF SERVICE

I, Emily Cardy, counsel for the defendant herein,
do hereby certify that on this 17th day of March, 2017,
I served a copy of the foregoing Application for Direct
Appellate Review and Memorandum in support thereof, by
mailing the same first-class postage prepaid, to the
office of the following:

Elin H. Graydon
Office of the District Attorney
10 Federal Street
Salem, MA 01970

/s/ Emily A. Cardy
Emily A. Cardy
BBO #676840
COMMITTEE FOR PUBLIC COUNSEL SERVICES
Public Defender Division
44 Bromfield Street
Boston, MA 02108
telephone 617-482-6212
ecardy@publiccounsel.net



**COMMONWEALTH OF MASSACHUSETTS
ESSEX COUNTY
Docket Report**

1477CR00683
Commonwealth vs. Pickering, Jonathan C

CASE TYPE:	Indictment	FILE DATE:	06/04/2014
ACTION CODE:	272/16-2	CASE TRACK:	B - Complex
DESCRIPTION:	LEWDNESS, OPEN AND GROSS c272 §16		
CASE DISPOSITION DATE	11/18/2014	CASE STATUS:	Closed
CASE DISPOSITION:	Disposed	STATUS DATE:	04/25/2016
CASE JUDGE:		CASE SESSION:	Criminal 1 - K

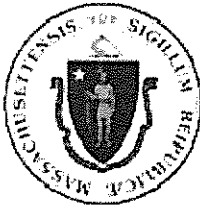
LINKED CASE

DCM TRACK

Tickler Description	Due Date	Completion Date
Pre-Trial Hearing	07/17/2014	11/18/2014
Final Pre-Trial Conference	03/30/2015	11/18/2014
Case Disposition	04/13/2015	11/18/2014

PARTIES

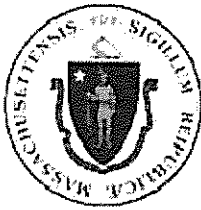
<p>Prosecutor Commonwealth</p>	<p>Attorney for the Commonwealth 655118 Sheehan, Michael J. Essex County District Attorneys Office Essex County District Attorneys Office 10 Federal Street Salem, MA 01970 Work Phone (978) 745-6610 Added Date: 07/14/2014</p>
<p>Defendant Pickering, Jonathan C 198 Locust St Lynn, MA 01902</p>	<p>682245 Reeves, Meredith Committee For Public Counsel Services Committee For Public Counsel Services One Salem Green Suite 408 Salem, MA 01970 Work Phone (978) 825-2020 Added Date: 04/11/2016</p> <p>682927 Attorney for the Commonwealth Levin, Patrick Committee for Public Counsel Services Committee for Public Counsel Services 44 Bromfield Street Boston, MA 02108 Work Phone (617) 482-6212 Added Date: 05/17/2016</p>



COMMONWEALTH OF MASSACHUSETTS
ESSEX COUNTY
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PARTY CHARGES

#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date
1	04/13/2014 LEWDNESS, OPEN AND GROSS c272 §16	272/16-2	Lynn		
	Sentence Date: 04/25/2016		Committed to HOC		
	Term:	Yrs 2 Mos 0	Days 0	To Serve: Yrs 2 Mos 0 Days 0	
				Guilty	11/18/2014
2	04/14/2014 LEWDNESS, OPEN AND GROSS c272 §16	272/16-2	Lynn		
				Guilty	11/18/2014



**COMMONWEALTH OF MASSACHUSETTS
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EVENTS

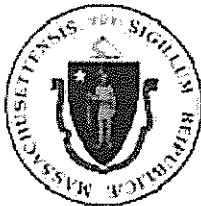
Date	Session	Event	Result	Resulting Judge
07/17/2014	Criminal 1 - K	Arraignment	Held as Scheduled	
08/06/2014	Criminal 1 - K	Pre-Trial Conference	Held as Scheduled	
09/12/2014	Criminal 1 - K	Motion Hearing	Rescheduled	
10/07/2014	Criminal 3 - I	Lobby Conference	Held as Scheduled	
11/05/2014	Criminal 3 - I	Hearing for Change of Plea	Not Held	
11/05/2014	Criminal 1 - K	Non-Evidentiary Hearing on Suppression	Rescheduled	
11/18/2014	Criminal 3 - I	Hearing for Change of Plea	Held as Scheduled	
12/19/2014	Criminal 3 - I	Non-Evidentiary Hearing on Suppression	Canceled	
03/16/2015	Criminal 3 - I	Hearing for Probation Report	Rescheduled	Lowy
03/30/2015	Criminal 3 - I	Hearing for Probation Report	Held as Scheduled	Lowy
09/14/2015	Criminal 1 - K	Scheduling Conference	Held as Scheduled	Lu
10/20/2015	Criminal 1 - K	Final Probation Surrender Hearing	Not Held	Lu
11/30/2015	Criminal 1 - K	Final Probation Surrender Hearing	Not Held	Lu
12/15/2015	Criminal 1 - K	Hearing RE: Discovery Motion(s)	Held as Scheduled	Lowy
12/21/2015	Criminal 1 - K	Final Probation Surrender Hearing	Not Held	Lowy
02/29/2016	Criminal 1 - K	Final Probation Surrender Hearing	Not Held	Feeley
03/31/2016	Criminal 1 - K	Final Probation Surrender Hearing	Not Held	Feeley
04/11/2016	Civil / Criminal - H (Salem)	Hearing for Probation Report	Held as Scheduled	Feeley
04/11/2016	Criminal 1 - K	Hearing for Probation Report	Not Held	Feeley
04/19/2016	Civil / Criminal - H (Salem)	Hearing for Probation Report	Rescheduled	Feeley
04/25/2016	Civil / Criminal - H (Salem)	Hearing for Probation Report	Held as Scheduled	Feeley



**COMMONWEALTH OF MASSACHUSETTS
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FINANCIAL DETAILS

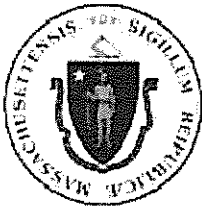
Date	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
07/17/2014	Legal counsel fee assessed in the amount of \$150.00 (Feeley, J)	0.00	0.00	0.00	0.00
11/18/2014	Legal counsel fee assessed in the amount of \$150.00***to be paid during probation. (David Lowy, Justice)	0.00	0.00	0.00	0.00
03/14/2015	<p>** As of the 03/14/2015, \$150.00 was assessed and \$.00 has been paid to date, leaving a "remaining balance" of \$150.00. Refer to the paper case file to obtain the detailed accounting history. The assessment category for this transaction was COUNSELFEE. Receipt: 2710 Date: 05/28/2015 Receipt: 3892 Date: 08/11/2015</p> <p>Dismissed Type: Waived judges order. Dismissed Date: 05/05/2016 Dismissed Amount: 20.00 Dismissing Clerk / Judge: Drechsler, Hon. Thomas Dismissed By: KTBOOK77</p>	150.00	130.00	20.00	0.00
03/14/2015	<p>** As of the 03/14/2015, \$3,900.00 was assessed and \$195.00 has been paid to date, leaving a "remaining balance" of \$3,705.00. Refer to the paper case file to obtain the detailed accounting history. The assessment category for this transaction was PSFM. Receipt: 2232 Date: 04/30/2015 Receipt: 3387 Date: 07/09/2015</p> <p>Dismissed Type: Waived judges order. Dismissed Date: 05/05/2016 Dismissed Amount: 3,600.00 Dismissing Clerk / Judge: Drechsler, Hon. Thomas Dismissed By: KTBOOK77</p>	3,900.00	105.00	3,795.00	0.00



**COMMONWEALTH OF MASSACHUSETTS
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03/14/2015	** As of the 03/14/2015, \$90.00 was assessed and \$.00 has been paid to date, leaving a "remaining balance" of \$90.00. Refer to the paper case file to obtain the detailed accounting history. The assessment category for this transaction was VICTIMWITN. Receipt: 1772 Date: 04/02/2015 Receipt: 2232 Date: 04/30/2015	90.00	90.00	0.00	0.00
08/21/2015	Default warrant recall fee assessed. Default Warrant created on 08/21/2015 for Pickering, Jonathan C Dismissed Type: Waived judges order. Dismissed Date: 05/05/2016 Dismissed Amount: 50.00 Dismissing Clerk / Judge: Drechsler, Hon. Thomas Dismissed By: KTBOOK77	50.00	0.00	50.00	0.00
Total		4,190.00	325.00	3,865.00	0.00

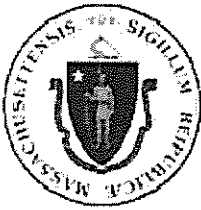
Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				



**COMMONWEALTH OF MASSACHUSETTS
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INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
06/04/2014	1	Indictment returned	
07/17/2014		Deft arraigned before Court	
07/17/2014	2	Appearance of Commonwealth's Atty: Michael Sheehan	
07/17/2014	3	Appearance of Deft's Atty: Thomas Pierce	
07/17/2014		Deft waives reading of indictment	
07/17/2014		RE Offense 1:Plea of not guilty	
07/17/2014		RE Offense 2:Plea of not guilty	
07/17/2014		Deft released on personal recognizance	
07/17/2014		Bail: Conditions of Release stay away from McDonalds at 60 Boston St Lynn (Feeley, J)	
07/17/2014		Assigned to Track "B" see scheduling order	
07/17/2014		Tracking deadlines Active since return date	
07/17/2014	4	Case Tracking scheduling order (John T Lu, Justice) mailed 7/17/2014	
07/17/2014	5	Notice of discovery filed in court	
11/18/2014		RE Offense 1:Guilty plea	
11/18/2014		RE Offense 2:Guilty plea	
11/18/2014	6	Waiver of defendants' rights - filed.	
11/18/2014	7	Re Offense 001: Defendant sentenced to Two (2) Years committed to the House of Corrections, Thirty (30) Days to serve, balance suspended for Five (5) Years. Credit of Zero (0) Days. (David Lowy, Justice)	
11/18/2014		Re Offense 002: Defendant sentenced to Five (5) Years Probation to be served from and after Offense 001. (David Lowy, Justice)	
11/18/2014		Defendant is subject to the following special conditions: 1) Sex offender treatment at Lynn Community Health Center, 2) No unsupervised contact with children under 16 Years old, 3) Gainfully employed or submit 5 job applications per week, 4) No use of a computer in public or library, 5) Stay away/no contact with victim or mcDonalds, 6) GPS monitoring plus fee.	
11/18/2014	8	Victim-witness fee assessed: \$90.00***to be paid during probation. (David Lowy, Justice)	
11/18/2014		Probation supervision fee assessed: \$65.00 monthly. (David Lowy, Justice)	
12/12/2014	9	MOTION by Deft: To Amend Probation Conditions - filed. (copy of motion and docket sheets to Judge Lowy & Prob. Dept.	
12/24/2014		Motion #9 (MOTION by Deft: To Amend Probation Conditions) - The matter may be scheduled for a hearing. (David Lowy, Justice) copies to Def. Att. T.P., CPCS & Probation Dept.	



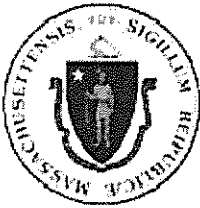
**COMMONWEALTH OF MASSACHUSETTS
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03/16/2015		Event Result: The following event: Hearing for Probation Report scheduled for 03/16/2015 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Not reached by Court Appeared:	Lowy
03/30/2015		Endorsement on Motion to Amend Probation Conditions, (#9.0): DENIED	Lowy
03/30/2015		Event Result: The following event: Hearing for Probation Report scheduled for 03/30/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled Hearing held on Defendant's Motion To Amend "Senie" Court will waive GPS Fee on finding of indigency.	Lowy
08/24/2015		Recalled: Default Warrant cancelled on 08/24/2015 for Pickering, Jonathan C	
08/24/2015		Appearance entered On this date Thomas Pierce, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Jonathan C Pickering	
08/24/2015		Appearance entered On this date Mark Brunswick Schmidt, Esq. added as Appointed - Indigent Defendant for Defendant Jonathan C Pickering	
08/24/2015		The defendant is committed without bail for the following reason: Per Order of the Court.	Lu
09/14/2015		Event Result: The following event: Scheduling Conference scheduled for 09/14/2015 09:30 AM has been resulted as follows: Result: Held as Scheduled	Lu
09/14/2015		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 10/20/2015 09:30 AM Final Probation Surrender Hearing.	
10/20/2015		Event Result: The following event: Final Probation Surrender Hearing scheduled for 10/20/2015 09:30 AM has been resulted as follows: Result: Not Held Reason: Joint request of parties	Lu
10/20/2015		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 11/30/2015 09:30 AM Final Probation Surrender Hearing.	
10/20/2015	10	The defendant is committed without bail for the following reason: Per Order of the Court.	Lu
11/30/2015		Event Result: The following event: Final Probation Surrender Hearing scheduled for 11/30/2015 09:30 AM has been resulted as follows: Result: Not Held Reason: Request of Probation	Lu
11/30/2015		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 12/15/2015 09:30 AM Hearing RE: Discovery Motion(s). Video	
11/30/2015		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 12/21/2015 09:30 AM Final Probation Surrender Hearing.	



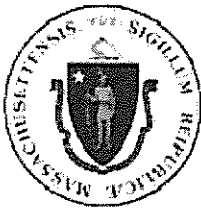
**COMMONWEALTH OF MASSACHUSETTS
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12/15/2015		Event Result: The following event: Hearing RE: Discovery Motion(s) scheduled for 12/15/2015 09:30 AM has been resulted as follows: Result: Held as Scheduled	Lowy
12/15/2015		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 02/29/2016 02:00 PM Final Probation Surrender Hearing.	
12/15/2015	11	Defendant 's Motion for Funds for an Expert - Allowed Lowy, J.	
12/15/2015		Event Result: The following event: Final Probation Surrender Hearing scheduled for 12/21/2015 09:30 AM has been resulted as follows: Result: Not Held Reason: Joint request of parties	Lowy
01/13/2016	12	Defendant 's Motion for terms of protective order for thumbdrive.	
02/26/2016		Event Result: The following event: Final Probation Surrender Hearing scheduled for 02/29/2016 02:00 PM has been resulted as follows: Result: Not Held Reason: Request of Probation	Feeley
02/26/2016		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 03/31/2016 09:30 AM Final Probation Surrender Hearing.	
03/25/2016	13	Defendant 's Motion for Supplemental Funds For An Expert and Affidavit in Support Of - filed.	
03/25/2016		Endorsement on Motion for Supplemental Funds For An Expert, (#13.0): ALLOWED (Timothy Q. Feeley, Justice) copies to Def. Att. M.R., CPCS & ADA M.S.	Feeley
03/25/2016		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Mark Brunswick Schmidt, Esq. Prosecutor: Commonwealth	
03/25/2016		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Mark Brunswick Schmidt, Esq. Prosecutor: Commonwealth	
03/30/2016		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 03/31/2016 09:30 AM Final Probation Surrender Hearing.	
03/31/2016		Event Result: The following event: Final Probation Surrender Hearing scheduled for 03/31/2016 09:30 AM has been resulted as follows: Result: Not Held Reason: Joint request of parties	Feeley
03/31/2016		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 04/11/2016 09:30 AM Hearing for Probation Report.	
04/08/2016		Event Result: The following event: Hearing for Probation Report scheduled for 04/11/2016 09:30 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session	Feeley



**COMMONWEALTH OF MASSACHUSETTS
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04/11/2016		Attorney appearance On this date Meredith Reeves, Esq. added for Defendant Jonathan C Pickering	
04/11/2016	14	Defendant Mark Brunswick Schmidt, Esq.'s Motion for Supplemental Funds For An Expert and Memorandum in Support	
04/11/2016		Event Result: The following event: Hearing for Probation Report scheduled for 04/11/2016 09:00 AM has been resulted as follows: Result: Held as Scheduled	Feeley
04/11/2016		Attorney appearance On this date Mark Brunswick Schmidt, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Jonathan C Pickering	
04/11/2016		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 04/19/2016 09:30 AM Hearing for Probation Report. 9:30 am call FIRST BUS	
04/14/2016		Event Result: The following event: Hearing for Probation Report scheduled for 04/19/2016 09:30 AM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	Feeley
04/14/2016		Habeas Corpus for defendant issued to Essex County House of Correction returnable for 04/25/2016 09:30 AM Hearing for Probation Report. 9:30AM Call FIRST BUS!	
04/25/2016		Event Result: The following event: Hearing for Probation Report scheduled for 04/25/2016 09:30 AM has been resulted as follows: Result: Held as Scheduled	Feeley
04/25/2016		Defendant sentenced: Sentence Date: 04/25/2016 Judge: Feeley, Hon. Timothy Q Charge #: 1 LEWDNESS, OPEN AND GROSS c272 §16 Committed to HOC Term: 2 Years, 0 Months, 0 Days To Serve: 2 Years, 0 Months, 0 Days Committed to Essex County House of Correction Credits 248 Days Miscellaneous Options Further Orders of the Court: Committed to balance of 2 yr sentence on Count 001 - minus 30 days already served - 248 days jail credit - ALL OUTSTANDING FEES REMITTED	
04/25/2016	15	Issued on this date: Mitt For Sentence (First 6 charges) Sent On: 04/25/2016 12:13:58	



**COMMONWEALTH OF MASSACHUSETTS
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04/25/2016		Defendant, being represented by counsel, found in violation of conditions of probation after hearing, probation sentence revoked on Count 002	Feeley
04/25/2016		Probation terminated; Defendant discharged. on Count 002 ONLY (sentenced to balance of 2 year sentence on Count 001)	Feeley
04/25/2016	16	ORDER: Waiver/Remittance Of Fees During Probation (Timothy Q. Feeley, Justice)	Feeley
04/27/2016	17	Notice of appeal filed Applies To: Commonwealth (Prosecutor); Pickering, Jonathan C (Defendant); Sheehan, Esq., Michael J. (Attorney) on behalf of Commonwealth (Prosecutor); Reeves, Esq., Meredith (Attorney) on behalf of Pickering, Jonathan C (Defendant)	
05/06/2016		General correspondence regarding CD of 4/25/16 and 4/11/16 hearings sent to OTS on this date	
05/11/2016	18	Court Reporter FTR H is hereby notified to prepare one copy of the transcript of the evidence of 04/11/2016 09:30 AM Hearing for Probation Report, 04/25/2016 09:30 AM Hearing for Probation Report.	
05/16/2016	19	Attorney appearance On this date Patrick Levin, Esq. added as Attorney for the Commonwealth for Defendant Jonathan C Pickering	